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Nos. 82-1005, 82-1247, and 82-1591

In the Supreme Court of the United States

October Term, 1983

CHEVRON U.S.A., INC.,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al.

AMERICAN IRON AND STEEL INSTITUTE et al.,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al.

WILLIAM D. RUCKELSHAUS, Administrator, Environmental Protection Agency,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF MAINE, STATE OF NEW JERSEY, STATE OF NEW YORK, STATE OF VERMONT, AND STATE OF WISCONSIN, AMICI CURIAE

October 28, 1983

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QUESTION PRESENTED

Whether the Clean Air Act permits EPA to waive new source review for new and modified facilities located within existing plants in nonattainment areas?

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INTEREST OF AMICI CURIAE

This brief is filed, amici curiae, jointly on behalf of the Commonwealth of Pennsylvania and States of Colorado, Connecticut, Maine, New Jersey, New York, Vermont, and Wisconsin, (hereinafter the "Amici") pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Respondents Natural Resources Defense Council, *et al.* (hereinafter "NRDC"). Amici urge this Honorable Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

Petitioner EPA states that it adopted the new definition of "source" to add flexibility in the administration of the Act. Amici welcome flexibility in the administration of some Clean Air Act programs, but believe that, for sound reasons, Congress intended that the requirements of the nonattainment program (set forth in Part D of the Clean Air Act) be nationally uniform. The waiver of new source review for new and modified facilities at existing industrial plants results in weakened emission limits and reduced incentives for compliance. EPA's plantwide definition of "source" will reduce the scope of new source review in some localities. This will increase the pressure on other localities to similarly reduce new source review in order to compete for modernized facilities. Although EPA asserts that its plantwide definition of "source" is

a state option, the economic pressure to attract modernization capital will force most states to adopt this definition. New source review is not intended to be an economic mechanism whereby states compete with each other to attract modernization at existing industrial plants. Amici are not interested in achieving short term modernization at the expense of long term harm to the public health.

Petitioner EPA has argued that it has adopted the plant-wide definition of "source" on behalf of the states. EPA Brief at 2-3. While many states commented both positively and negatively when EPA's new definition was first proposed,[1] no states supported EPA's position after the lower court's decision was reached. The State and Territorial Air Pollution Program Administrators ("STAPPA"), representing the state air pollution program officials, and the Association of Local Air Pollution Control Officials ("ALAPCO"), representing local governmental air pollution program officials, have endorsed the Court of Appeals decision, and have urged EPA Administrator Ruckelshaus to accept this decision. See Appendices A and B. EPA's representation that the states generally support EPA's position, as expressed throughout in its brief, is erroneous.

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[1] Some of the comments which EPA cites in favor of the plant-wide definition were, in fact, qualified statements. See EPA Brief at 39, n.50.

ARGUMENT

I. Introduction

Amici adopt NRDC's analysis of the term "source" in the Clean Air Act, particularly as the term is used in Part D of the Act (relating to plan requirements for nonattainment areas). The history of the Act since 1970 indicates that Congress intended the term "source" to have a specific meaning and that Congress intended new source review of all new or modified major emitting facilities in nonattainment areas to be an important part of the program for attainment of national ambient air quality standards. Moreover, as NRDC explains, EPA's position jeopardizes expeditious attainment of the minimum national ambient air quality standards.

In addition, Amici assert that the Administrator's flexible plant-wide definition of "source" undercuts several purposes of the Clean Air Act when such a definition is permitted in nonattainment areas. The Administrator's position eliminates nationally uniform standards of review for new sources. It fosters undesirable competition among the states to attract new industry and expand existing industry at the expense of air quality; it inequitably favors the expansion of existing plants to the prejudice of new plants. For all these reasons, as well as those submitted by NRDC, the decision of the lower court should be affirmed.

II. EPA's Plant-Wide Definition of "Source" Insulates Some Sources From New Source Review

Amici disagree with EPA's view that the Clean Air Act provides discretion to the Administrator to define "source" as he chooses. EPA's view is based on the premise that Part D of the Act provides a flexible program for reaching attainment, i.e., that the states need not adopt all the elements of new source review if it is possible to reach attainment by other means. EPA Brief at 17-18. Amici submit that this premise is incorrect. The Act mandates uniform application of new source review in nonattainment areas.

Contrary to EPA's assertions that the legislative history of the 1977 Amendments is not helpful in determining the meaning of the term "source," it is clear from the legislative history that new source review was intended to apply to all new or modified facilities within existing plants. Congress was certainly aware of arguments that the adoption of stricter standards for such new or modified facilities locating in nonattainment areas would inhibit growth and discourage industries from locating in nonattainment areas.[2] Nevertheless, Congress adopted uniform new source review requirements which place special obligations for air pollution control on new or modified major emitting facilities located in nonattainment areas.

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[2] See 123 Cong. Rec. 16204 (1977) (remarks of Rep. Waxman), 4 Leg. Hist. 3055; 123 Cong. Rec. 16196 (1977) (remarks of Rep. Rogers) 4 Leg. Hist. 3036-3037.

In presenting the Clean Air Act Amendments of 1977 to the Senate, Senator Muskie commented:

> Thus, [under the offset ruling and Part D new source review requirements] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a new reduction from previous emission levels. 123 Cong. Rec. at §13702 (daily edition, August 4, 1977).

EPA may not adopt a scheme of new source review which excludes some new sources. Under EPA's plant-wide definition of "source," an owner can replace a dirty *old* source within an existing plant with an equally dirty *new* source and evade the requirements of Section 173, including the "lowest achievable emission rate" requirement and the statewide compliance requirement.[3] Under EPA's exclusion of new source review, no air pollution control equip-

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[3] Suppose an industrial plant were to replace a boiler. The old facility may have no modern air cleaning equipment, and would be labelled by the local air pollution control agency as "grossly polluting." The plant owner could replace the old boiler with a new boiler, with no modern air pollution control equipment. EPA has promulgated no new source performance standard for this category of source, therefore, Section 111 of the Act would not apply. Since the new boiler's emissions will be offset by the retirement of the old boiler, there will be no net air quality impairment, and indeed, there may be some improvement. Under EPA's plant-wide definition of source, the source owner need not install technology which meets the lowest achievable emission rate, and need not demonstrate compliance at other sources in the state.

ment need be installed at all, and unless a state or local rule mandates such installation.[4] EPA's plant-wide definition has widespread adverse ramifications for the states.

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[4] EPA states that a new or modified facility, nevertheless must meet new source performance standards, and implies that this level of the technological performance is similar to "lowest achievable emission rate." The language of the Act indicates that these two emission standards are not identical. Compare Section 111(a)(1), 42 U.S.C. §7411(a)(1) with Section 171(3), 42 U.S.C. §7501(3). Court decisions have indicated that new source performance standards are not technology forcing, but merely restate what is "adequately demonstrated" and currently "achievable." See *National Lime Association v. EPA*, 627 F.2d 416 (D.C. Cir. 1980). *Essex Chemical Co. v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

In addition, Congress required the "lowest achievable emission rate" for new sources precisely because Congress was dissatisfied with EPA's performance under the new source performance program. (See Section 111(f) of the Act, 42 U.S.C. §741'(f), wherein Congress mandated EPA to accelerate its schedule of promulgation of new source performance standards.) EPA, to date, has promulgated new source performance standards for only a small number of source categories. See 40 CFR Part 60. There are *no* new source performance standards for many categories of new sources, such as industrial boilers, coke oven batteries, volatile organic compound sources, etc. J.A. at 123. Despite EPA's representation that it is accelerating its schedule of adoption of new source performance standards, which representation was made in the Preamble to the final rulemaking (J.A. 106-07), EPA has adopted only nine new source performance standards since that time. See 47 Fed. Reg. 950 (January 8, 1982) for a list of over 50 new source performance standards which EPA has not adopted to date.

III. EPA's Definition of "Source" Improperly Creates Interstate Pressures To Weaken Emission Standards

The legislative history of the 1970 Act reflects a congressional intent to prevent interstate competition for new sources by requiring new sources in all states to meet technology based emission standards. This uniformity of new source review was a significant feature of the 1970 Act.[5] Similarly, uniform new source review under Part D of the 1977 Act prevents interstate and intercity competition for new facilities. Correctly applied, a state or local government would have no incentive to bargain away the public health of local communities.[6]

Many companies have industrial plants located in urban nonattainment areas. Such plants often have antiquated equipment which needs to be modernized. If a company with plants in several states decides to modernize a plant it could conduct a program of "forum shopping" among states. The capital investment and jobs associated with the installation of a new or modified facility are very attractive to many communities. Under EPA's plant-wide definition, a state or local government would have the option and the incentive to compete for the modernized plant by considering the new or modified facility not to be a new "source" and thereby offering more lenient emis-

[5] H.R. Rep. 1146, 91st Cong., 2nd Sess. 3 (1970).

[6] See discussion of new source review in nonattainment areas. H. Rep. No. 294, 95th Cong. 1st Sess. 210-17 (1977).

sion limits.[7] On the other hand, a state which insists on new source review under Part D (and its accompanying conditions for "lowest achievable emission rates" and statewide compliance) would be at a competitive disadvantage. By eliminating uniform new source review, EPA has turned emission controls into a new mechanism for economic competition between states, at the expense of improvement to air quality.

Further, EPA overstates the amount of discretion states and local governments actually have in adopting new source rules. If EPA adopts a rule that empowers state and local governments to adopt a plant-wide definition of "source" in their nonattainment plans, most state and local governments ultimately would be compelled to adopt such a definition. If a state or local government fails to adopt such a definition, it would lose economic growth to other areas in the country. Ironically, EPA's plant-wide definition forces states and local governments with high environmental standards to choose between reducing these standards in order to provide incentives for economic growth or losing potential industrial development. Congress never intended such a result.

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[7] This can be accomplished easily where there is no new source performance standard for the new or modified facility since the "lowest achievable emission rate" is not required under EPA's plant-wide definition. See note 4, *supra*.

IV. The Waiver of New Source Review for Certain Facilities at Existing Plants Would Hamper State Enforcement Programs

The new source review program for nonattainment areas also requires the owner of a new or modified major source to demonstrate statewide compliance at its other plants within the state. Section 173(3), 42 U.S.C. §7503(3). This provision was inserted in the Act to enhance enforcement by linking modernization with compliance at existing plants. EPA's plant-wide definition would allow a company with an existing plant in a nonattainment area to escape the requirement of statewide compliance for existing plants by not requiring new source review for all modernization projects. A replacement facility or modernization project that does not increase the plant's overall emissions would not be subject to new source review.

EPA has stated no public policy reason for making the statewide compliance requirement optional. The legislative history of the Act does not indicate this requirement is to be optional. Congress intended the new source review provisions of Section 173 to aid enforcement against existing plants. The House Report notes that this provision was necessary due to the number of large air pollution sources which had made an inadequate commitment to implement controls and

which were, in fact, delaying compliance. H.R. Rep. No. 95-294, 95th Cong., 1 Sess. (1977) at 210-213.[8]

This provision has been very effective in forcing operators of existing plants to comply with the Act's provisions in a timely manner. For instance, companies within the steel industry which had not complied with the 1970 Act by the original attainment deadlines,[9] entered into several comprehensive consent decrees that resolved existing compliance problems and at the same time allowed for modernization.[10] The practical advantages of this provision of Section 173 of the Act are obvious. A plant which desires to modernize must reach a settlement on existing problems. A voluntary settlement between a company and the government leads to speedier compliance because the delays and expense of litigation are avoided.

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[8] Indeed the House Report found that: "Unless these noncompliance problems are corrected, the nonattainment problem will persist and grow more serious." *Id.* at 211.

[9] As the Seventh Circuit observed "much of the Congressional concern over delays in meeting ambient air quality standards was directed at the failure of the [steel industry intervenors in this case] to reach compliance." *United States Steel v. EPA*, 605 F.2d 283, n.5 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980).

As the House Report noted:

> The committee is also mindful of the fact that several categories of major polluters have not complied with emissions limits in nonattainment areas. The 1975 subcommittee hearings reflect this disturbingly high incidence of noncompliance.

H. Rep. No. 294, 95th Cong. 1st Sess. 210-11 (1977).

[10] See summary of EPA settlements with Republic Steel Corp. and United States Steel Corp. at 9 Envir. Rptr. 1123 and 10 Envir. Rptr. 119.

EPA may argue that its plantwide definition of "source" does not preclude states from retaining the statewide compliance requirements of Section 173 in its state implementation plan. Practically speaking, this is not an option that is easy for a state to exercise when it is faced with losing a modernization project to a competing state which does not require the company to clean up its other existing plants.

V. Application of EPA's Definition Would Reduce the Amount of Air Resources Available for New Sources

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One of the results of imposing the new source review requirement for new or modified major emitting facilities is to make air resources available for other new facilities. If older facilities are retired and replaced with equally polluting new facilities, no real progress is made toward attainment and no air resources are available for new growth. Existing plants will have consumed any margin for growth.

In *ASARCO v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the District of Columbia Court of Appeals quite aptly described this problem in considering a plantwide definition of "source" under the new source performance standards program.

> Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements. The "best" pollution control technology would never have to be installed, and existing

> plants would use up much of the available clean air, inhibiting construction of new plants (which would comply with the NSPS). 578 F.2d at 329-30 n. 40.

A similar problem exists for nonattainment areas if EPA's definition of "source" is upheld. Existing plants could prevent the introduction of new plants in a nonattainment area by replacing older facilities with new facilities that do not meet the "lowest achievable emission rate".

Congress was aware of this problem, and mandated the "lowest achievable emission rate" for new facilities "in order to permit room for maximum potential economic growth". H.R. Rep. 95-294, 95th Cong. 1st Sess. 215 (1977). By reducing the amount of air resources a new facility consumes more air resources can be made available to other prospective industries. If an old boiler which emits 400 tons of sulfur dioxide per year is retired, and is replaced with a new boiler which emits 400 tons, no net benefit accrues to air quality.[11] However, if the old boiler is replaced with a new boiler that complies with the lowest achievable emission rate and emits 50 tons of sulfur dioxide per year, the air pollution load is reduced by 350 tons. This reduction can either be used for other new facilities or can be used in the general program for attaining the national ambient air quality standards.

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[11] In fact, as NRDC correctly asserts, under EPA's plant-wide definition, a new facility may increase total plant-wide emissions, since "de minimis" increases in emissions are not subject to new source review.

New source review under Part D of the Act was intended to promote long term improvement in air quality by forcing the installation of better pollution controls along with plant modernization.[12] EPA may be able to show that, in individual cases, plant modernization without new source review (and its accompanying conditions) may result in some marginal improvement in air quality. EPA is willing to accept half-steps toward attainment of air quality goals instead of the more stringent measures mandated by Congress through the requirement of new source review. However, other than by mere assertion, EPA has not shown that the additional air quality improvement which results from the "lowest achievable emission rate" requirements and other requirements of full new source review do not accrue to the long term benefit of the public.[13]

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[12] See ALAPCO letter, Appendix B: "Replacement of old high-polluting sources with new low-polluting sources constitutes a significant portion of plans for the enhancement of air quality in nonattainment areas. Many areas are dependent upon a projection of reductions in emissions to be obtained through the new source review program."

[13] The lower court found no support in the record for EPA's conclusion that, in the aggregate, air quality would be improved at a more expeditious pace under the rescinded rule. *Natural Resources Defense Council v. Gorsuch*, 685 F.2d at 727, n.41.

CONCLUSION

For the reasons put forth above, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,
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APPENDIX A

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS
444 N. Capitol St., NW Washington, DC 20001
202-624-7864

July 8, 1983

William Ruckelshaus
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Ruckelshaus:

The State and Territorial Air Pollution Program Administrators (STAPPA) would like to make its position clear relative to the Environmental Protection Agency's revision to the definition of source as it applies to nonattainment areas.

We are concerned that the October 1981 change in definition of source may needlessly increase emissions in areas violating the primary national ambient air quality standards (NAAQS) and jeopardize the potential for achieving the NAAQS in these areas. We do not know if the October 1981 change is consistent with the statutory requirements of the Clean Air Act and therefore, will not discuss those issues in this letter.

The air quality needs of areas violating the health-related NAAQS are different from those in

Prevention of Significant Deterioration (PSD) areas. In nonattainment areas, there is a need to *reduce* emissions while, in PSD areas, the emphasis is on limiting *increases* in emissions. Making the nonattainment definition of source identical to that used in PSD areas will make it more difficult to obtain the emission reductions necessary to assure attainment of the NAAQS. The reasons for this are discussed below.

The PSD program definition of "significant" exempts from the new source review increases in emissions up to 40, 25 and 40 tons per year for sulfur dioxide (SO_2), total suspended particulates (TSP) and volatile organic compounds (VOC) sources, respectively. Although these levels of emissions may be "insignificant" in areas attaining standards, this is not the case in many nonattainment areas. In most TSP and VOC nonattainment areas and some eastern SO_2 nonattaiment areas, the violations of the NAAQS result from the cumulative impact of all sources in the nonattainment area. Allowing even the PSD significant level increases from new and modified sources would further burden already overburdened atmospheres and *require corresponding reductions from existing sources.*

Further, the October 1981 definition of source would exempt some sources from the nonattainment area control technology requirements (BACT and LAER) based on the rationale that the New Source Performance Standards (NSPS) would assure use of the most up-to-date pollution control technology. This rationale is flawed because NSPS have not been promulgated for a large number of major air pollution sources (for example, coke ovens, industrial boilers and numerous VOC source categories). Additionally, this

definition of source is structured so that the exempt sources would not even be subject to the reasonably available control technology (RACT) requirements of Section 172(b)(2) of the Clean Air Act.

Exempting sources from the control technology requirements and allowing PSD emission increases while attempting to solely rely on the reasonable further progress (RFP) provision as the measure of success of the Part D plans may be inadequate to assure expeditious attainment. The current Part D State Implementation Plan control strategies are based, in many cases, on rudimentary emission–air quality relationships (ozone) and plans for further study of the nonattainment problem (TSP). As a result, there is considerable uncertainty regarding the adequacy of the amount of emission reductions necessary to achieve some health-related standards. This ambiguity makes the Part D RFP plans in many cases tenuous at best. In addition, the RFP demonstrations are an "after-the-fact" evaluation of progress. In most cases, they are based on emission inventories that lag by two years or more. Because of this time lag, numerous new and reconstructed sources may be built with lenient or no controls before it is realized that the Part D plans may not be adequate to attain the NAAQS. Ultimately, this may result in the costly retrofitting of better controls on those new and reconstructed sources originally exempt from the new source review.

STAPPA believes that it is appropriate to revise the October 1981 definition of source as it applies to nonattainment areas and revert to the August 1980 dual source definition. Reverting to the dual source definition of source could prevent the construction of

uncontrolled process equipment in nonattainment areas, could prevent increased levels of air contaminants in nonattainment areas and could provide for expeditious attainment of the health-related primary ambient air quality standards.

Sincerely,
/s/ Randolph Wood
Randolph Wood
President

APPENDIX B

ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS
444 N. Capitol St. NW, Washington, DC 20001
202-624-7864

July 18, 1983

William Ruckelshaus
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Ruckelshaus:

This letter is written on behalf of the national Association of Local Air Pollution Control Officials (ALAPCO) to express our position concerning the definition of "stationary source" and the case pending before the Supreme Court. ALAPCO is opposed to the position taken by the U.S. Environmental Protection Agency and industry petitioners in their suit against the Natural Resources Defense Council on this issue. We believe that the term "stationary source" should be defined as any individual process or activity capable of emitting an air pollutant.

ALAPCO members feel that the new source review process through the establishment of modern, well-controlled sources, is a vital element of the plan for clean air for the future. Replacement of old high-polluting sources with new low-polluting sources con-

stitutes a significant portion of plans for the enhancement of air quality in nonattainment areas. Many areas are dependent upon a projection of reductions in emissions to be obtained through the new source review program. If these reductions are not realized, then we face the prospect of revisiting for the third time existing sources for emissions reductions. It seems a more sound process to adopt a process-specific definition of source and apply tight controls to each new source at the time of installation.

Furthermore, we believe that the adoption of a plant-wide definition of source in nonattainment areas is contrary to the intent of Congress and the letter of the law as expressed in Section 173 of the Clean Air Act. This section places four provisions on the construction of new or modified stationary sources in nonattainment areas. These are:

- that allowable emissions from the new source combined with allowable emissions from existing sources in the region and with emissions from non-major new sources installed without offsets are sufficient, so as to assure that the region is maintaining reasonable further progress toward attainment of the applicable standards;
- that the proposed source will achieve the lowest achievable emission rate (LAER);
- that all existing sources under the ownership of the proposed new source are in compliance or on an acceptable schedule for compliance; and
- that the applicable implementation plan in the state is being carried out.

Under the plant-wide definition, an installation could be accomplished without meeting even one of the four requirements.

Since the original establishment of its Clean Air Act positions, the ALAPCO organization has called for the application of "Best Available Control Technology" (BACT) on all new sources which emit at least 50 tons of pollutants per year. We feel that the BACT requirement should be applied nationwide in both attainment and nonattainment areas. The provision of a BACT requirement nationwide would aid in the pursuit of the following New Source Review goals: to minimize the consideration of air pollution rules in the interstate competition for industry, to enhance the potential for long-term economic growth through preservation of existing air quality, and to ensure that controls are applied at the time of least cost. The process-specific definition of source is necessary to assure progress toward the attainment of these goals.

If you have any questions about our position on this matter, please do not hesitate to contact me.

Sincerely,
/s/ Donald R. Arkell
Donald Arkell, President
Association of Local Air
Pollution Control Officials

cc: ALAPCO Board of Directors